UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TRANE PUERTO RICO, INC.

and Case 12-CA-144599

CONGRESO DE UNIONES
INDUSTRIALES DE PUERTO RICO

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for the General Counsel
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for the Respondent.
Jose A. Figueroa, Union President
Congreso De Uniones Industriales
De Puerto Rico,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was submitted to me by virtue of a Joint Motion and Stipulation of Facts, pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations, and an Order issued by Associate Chief Judge William Cates accepting the stipulation. The stipulation includes references to 32 joint exhibits, as well as General Counsel's Exhibit 1, the formal papers in this case.[1]

The complaint, as amended, alleges that Respondent violated Section 8(a)(5) and (1), as well as Section 8(d) of the Act, by bypassing the Charging Party Union (hereafter the Union) and dealing directly with the employees, whom the Union represents and are covered under a collective bargaining agreement between the Union and Respondent, in the following manner: Soliciting the employees to sign authorization forms that allowed Respondent to access employee driving records from the Puerto

[1] The joint exhibits contain both a Spanish version (subsection (a) of the numbered exhibit); and an English version (subsection (b) of the exhibit).

Rico Department of Transportation; and soliciting employees to obtain copies of their records and submit them to Respondent so they could be considered in disciplinary proceedings. Such conduct was undertaken, according to the complaint, without prior notice to the Union and without affording it the opportunity to bargain with respect to the Respondent's conduct and its effects.

The complaint also alleges that Respondent violated Section 8(a)(5) and (1) and Section 8(d) of the Act by implementing, maintaining and enforcing a new Vehicle Fleet Policy that changed existing terms and conditions of employment of unit employees embodied in the applicable collective bargaining agreement, including new limits on the personal use of Respondent's vehicles by employees and a new disciplinary policy that resulted in the discipline of a particular employee, Pedro Sanchez, all without the Union's consent.

Respondent filed an answer denying the essential allegations in the complaint. Both Respondent and the General Counsel submitted briefs, which I have read and considered.

Based on the stipulated record, as well as briefs submitted by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability Delaware Corporation with an office and place of business located in San Juan, Puerto Rico, is engaged in the sale and service of air conditioning systems for commercial and residential customers. During a representative one-year period, Respondent purchased and received, at its San Juan facility, goods valued in excess of $50,000 directly from outside the Commonwealth of Puerto Rico. I therefore find, as admitted by Respondent, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find, as Respondent also admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Background

Since on or about June 4, 1981, the Respondent has recognized the Union as the exclusive bargaining representative of the following appropriate unit of employees:

> All service and maintenance employees employed by [Respondent] at its San Juan, Puerto Rico facility, excluding all office and clerical employees,

professional personnel, senior service technicians, guards and supervisors, as defined in the Act.

Such recognition has been embodied in successive collective bargaining agreements, the most recent of which is effective by its terms from October 1, 2012 to September 30, 2016. Since January 1, 2015, the above bargaining unit has consisted of approximately 25 employees, comprised of service and controls employees and warehouse employees, whose duties include driving Respondent's vehicles.

The current collective bargaining agreement includes the following provisions that are relevant to this case:

Article 35

Article 35, entitled "Company Vehicles," sets forth rules governing use of Respondent's vehicles by employees for company-related work and "to transport themselves to and from home and jobsites." Among the rules describing employee responsibilities is one stating that the "employee agrees to drive the unit properly, following all Puerto Rican traffic laws (emphasis in original)." Employees are responsible for "paying any fine for violating Puerto Rican traffic laws" and agree to "maintain a current driver's license, pursuant to Puerto Rican traffic laws."

Article 20

Article 20, entitled "Termination and Discipline," provides that Respondent may "post reasonable rules and regulations, which . . . are essential to [Respondent's] good working order." The article also states that, "as long as it does not act unreasonably or arbitrarily, [Respondent] may discipline, suspend or terminate any employee, who . . . does not meet the set rules." It also states that, if the Union disagrees with an action taken by Respondent, it may "make an appeal" under the contractual grievance and arbitration proceeding.

Article 2

Article 2, entitled, "Administration Rights," amounts to what is known as a management rights clause. Section 1 of the article states as follows:

> The Union recognizes the [Respondent's] exclusive right to supervise, administrate and direct its maintenance and service business operations, unless previously negotiated limitations in the agreement are established, which shall be mandatory for the parties, said administration rights being stated in this agreement, including but not limited to: the direction of the work force, hiring, re-hiring, assigning, transferring, promoting, laying off, relocating, suspending, terminating and disciplining employees; determining the number of employees in any department, shift or classification;

> determining the number and size of the departments; establishing, revising, suspending and imposing the work schedule, rules and regulations, determining operations, distributing said services; determining the service activities to be conducted, the workplace (including methods, processes, production and distribution methods of said items, directing said activities), and determining the quality and production levels.

Section 2 of the article provides that the "Union may use the grievance and arbitration provisions of the agreement "whenever it feels that [Respondent] has exceeded the use of management rights recognized in this article."

Article 38

Article 38, entitled, "Overall Agreement," amounts to what is known as a zipper clause. Section 1 of the article states as follows:

> No subject or matter stated or indicated in this agreement, or which has not been specifically stated or indicated, or that has been omitted, shall be subject to collective bargaining during the term covered by this agreement, except as a result of a mutual agreement from the parties, even though said subjects or matters have not been made known or have been considered by one or both parties at the time of the negotiations or at the time this agreement was signed.

Section 2 of Article 38 states as follows: "No agreement, alteration or understanding that varies, nullifies or modifies any of the terms and conditions stated here, shall be mandatory for the parties, unless it is placed in writing between them."

Applicable Employee Manual

Respondent maintains an Employee Manual, the most recent version of which was revised on December 10, 2012 and superseded all prior versions of the manual. The 2012 Employee Manual (Jt. Exh. 4) contains policies and procedures related to the use of company vehicles and other matters related to company vehicles. The Manual is "applied concurrently with the collective bargaining agreement in those areas that are not inconsistent with the terms and provisions of the collective bargaining agreement." Stipulation no. 5.

The New Fleet Vehicle Policy

On September 16, 2013, Respondent learned from its parent company, Ingersoll Rand, that it had to comply with Ingersoll Rand's already-existing Fleet Vehicle Policy, including specific provisions regarding Motor Vehicle Reports (MVRs). Respondent's officials modified the policy originally received from Ingersoll Rand in an effort to

"temper it" to local laws and the existing collective bargaining agreement between the Respondent and the Union.

On October 15, 2014, Respondent's human resources manager, Sandra Angueira, sent an email to Union President Jose Alberto Figueroa offering dates to meet and discuss several issues, including the policies and procedures related to the Fleet Vehicle Policy. Figueroa agreed to meet on October 28, 2014.

On October 27, 2014, Angueira sent an email to Figueroa, attaching a letter describing Respondent's new Fleet Vehicle Policy and a copy of the policy itself. The letter states that the new policy is in accord with the requirements of Ingersoll Rand and would apply to all unit employees that use Respondent's vehicles. The letter also states that Respondent intends to implement the policy on January 31, 2015, after bargaining with the Union. It suggests several specific dates for negotiations in November 2014.

On October 28, 2014, Angueira and Respondent's Attorney, Anabel Rodriguez, met with Figueroa, as well as Alexander Soto and Victor Vega, who are not only delegates of the Union but also employees of Respondent. At the meeting, Angueira repeated the substance of the October 27 letter concerning the new policy, including its intended implementation date, Respondent's revision of the corporate policy to make it consistent with the existing collective bargaining agreement, and Respondent's desire to bargain over the new policy and its effects. At the meeting, Figueroa told Angueira and Rodriguez that the Union would provide Respondent with a written response to the Respondent's proposal.

On November 6, 2014, Respondent sent an email response to Respondent, stating the Union's position as follows: "[T]he policy and the law between the parties are contained in the Collective Bargaining Agreement. It was negotiated like this between the parties. Therefore, we do not agree to renegotiate."

In an email response to Figueroa, dated November 12, 2014, Angueira attached a letter setting forth Respondent's position. The letter stated that the new policy includes matters that are not covered in Article 35 of the existing agreement. It listed several of those matters, including the installation of a Global Positioning System (GPS) in its vehicles, the establishment of a procedure to obtain the MVRs of employees and the tracking of those records, as well as a point system for possible traffic infractions that might result in employee discipline. It also listed establishment of a training program for employee compliance with the new policy and other safety measures.

In another email with letter attached, dated November 19, Angueira told Figueroa she had not yet received a response from Figueroa to her communication from the week before and suggested new dates for bargaining, including several dates in December. Figueroa responded in an email to Angueira, dated November 21, 2014, stating as follows:

> The request to reopen the Agreement to negotiate article 35 is not accepted by the Union. The article can be negotiated when the time comes in 2016.

> Article 38 of the agreement clearly establishes that your request has to be agreed between the parties. Therefore, the Union has been clear from the beginning regarding this issue. If the Company insists on implementing a policy on vehicles, I will have no other recourse than to file a charge with the National Labor Relations Board.

On December 4, 2014, Rodriguez emailed Figueroa restating Respondent's disagreement with the Union's position and restating its position that certain matters in the new policy were not covered under the collective bargaining agreement. Respondent also restated its request for bargaining on several dates in December.

The parties agreed to meet, and did meet, on December 16, 2014, but no progress was made and each party adhered to the positions earlier expressed. In an email from Rodriguez to Figueroa, dated the same day, she summarized the positions of the parties and restated the Respondent's position that topics in the new policy were not covered in the bargaining agreement. She also asserted that "management rights empowered [Respondent] to adopt the necessary rules and measures to manage its labor force."

There were no further communications between the parties until January 13, 2015, at which time Figueroa sent Rodriguez an email response to her email of December 16. In that response, Figueroa restated the Union's position, as set forth in his November 21 email to Angueira, and said he would file a charge with the Labor Board.

On February 1, 2015, Respondent implemented the new Fleet Vehicle Policy it had proposed to the Union and began applying it to the bargaining unit employees. The policy is set forth in Jt. Exh. 17, which is summarized below.

The 18-page Fleet Vehicle Policy states that it will apply "concurrently" with "what is provided in the employee manual and the collective bargaining agreement." It describes employee responsibilities when driving Respondent's vehicles in some detail. For example, the policy prohibits personal use of company vehicles, with no specified exception, in contrast with Article 35 of the collective bargaining agreement, for employees to transport themselves "from their home to the job sites." In addition, the new policy requires that all authorized drivers "give permission" to Respondent "to access initial and periodic reports from the Department of Motor Vehicles." If permission is not given, the Respondent may cancel the employee's authorization to drive company vehicles and invoke "disciplinary actions including termination."

The policy also provides for a system of points "to weigh risks regarding the eligibility criteria from the record of the driver." These points are not necessarily the same points utilized by state or other jurisdictions governing drivers' licenses. Respondent is permitted to review an employee's driving record annually to apply its own point system, determine driver eligibility, and, based on its review, revoke the employee's driving privilege. Respondent's point system results in the categorization of drivers into certain levels. Drivers at level II are required to take additional safety

training; those at level III may lose their authorization to drive, at least during a pending investigation. The policy sets forth detailed examples of "unacceptable driving performance," that may result in revocation of authorization to drive, discipline, including termination, and reimbursement for losses because of serious or intentional negligence.

Training of Employees on the New Policy

On February 4, 6, and 18, 2015, Respondent held training sessions on the new Fleet Vehicle Policy for its employees, including the bargaining unit employees represented by the Union. During the training sessions, Angueria explained the new policy. She said that, if Respondent received notification of proposed disciplinary action from its Fleet Services Department, employees would have to provide Respondent with a copy of their MVR so that Respondent could "compare the information contained in the employee's MVR with the report prepared by its Fleet Services Department." Respondent did not inform the Union of the dates on which it would be holding those training sessions and no Union officers were invited to, or were present at, these training sessions, although, as indicated, Respondent had notified the Union of the implementation date of the policy and shared a copy of the policy with the Union.

During the above training sessions, Respondent distributed copies of the Fleet Vehicle Policy to the employees, as well as a document explaining the "driver risk level points system" that was part of the Fleet Vehicle Policy, and a document explaining the traffic points system promulgated by the Puerto Rico Department of Transportation. At these training sessions, Human Resources Manager Angueira mentioned that the new policy would be effective as of February 1, 2015. She also reviewed aspects of the new policy, including a comparison of the Puerto Rico Department of Transportation MVR structure with the Ingersoll Rand MVR disciplinary structure. She further stated that, if Respondent received any notification of proposed disciplinary action from Respondent's Fleet Services Department, employees would have to provide Respondent with a copy of their MVRs so that Respondent could compare the information contained in the employee's MVR with the report prepared by its Fleet Services Department. Unit employees were required to sign an acknowledgement form that they had received a copy of the new policy.

Respondent Secures Authorizations to Obtain Employee Driving Records

Beginning in May 2013 and continuing through August 2015, Respondent requested and obtained signed electronic forms from unit employees authorizing Respondent to access their Motor Vehicle Records (MVRs). Most of the authorizations were secured in September and October 2014. The employees who signed these forms were not new hires and Respondent did not communicate to the Union that it intended to request that employees sign these forms.

The Discipline of Employee Pedro Sanchez

On March 2, 2015, Respondent issued a disciplinary warning to unit employee Pedro Sanchez, pursuant to the new Fleet Vehicle policy. Sanchez was presented a letter by his supervisor that stated Sanchez had reached Level III driving status under the new policy and directing that Sanchez complete a series of actions as result. For example, Sanchez was required to provide a copy of his MVR every 3 months for the next year, agree to certain safety policies, complete driver education programs and notify Respondent of any changes in his driving privileges. Sanchez was required to sign a copy of the letter. J. Exh. 22(a). See also Stipulation nos. 24-28.

Sanchez filed a grievance contesting the disciplinary action under the current collective bargaining agreement. The grievance went through step 2 of the contractual grievance procedure with a denial by Respondent. On April 21, 2015, the Union filed a grievance concerning Sanchez's discipline before the Puerto Rico Department of Labor, Conciliation and Arbitration Bureau. The parties selected an arbitrator, but, at the time of the stipulation, no notice of hearing on the matter had issued. The parties have stipulated that, to date, the above discipline of Sanchez is the only discipline Respondent has issued to any unit employee for "having too many points on his driver's license, based on the 2015 Fleet Vehicle Policy." Stipulation no. 29.

B. Discussion and Analysis

General Principles

An employer's duty to bargain is set forth in Section 8(a)(5) and 8(d) of the Act. An employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing the wages, hours or other terms and conditions of employment of represented employees—mandatory subjects of bargaining—without first providing their exclusive bargaining representative with notice and meaningful opportunity to bargain about the change. *NLRB v. Katz,* 369 U.S. 736 (1962). Mandatory subjects include those matters that are "plainly germane to the 'working environment'" and "not among those 'managerial decisions, which lie at the core of entrepreneurial control.'" *Ford Motor Co. v. NLRB,* 441 U.S. 488, 498 (1979).

It is well settled that an employer violates Section 8(a)(5) and (1) if it bypasses the union representing its employees and instead deals with them directly on mandatory subjects. Direct dealing by its very nature undermines employee confidence in the effectiveness of their bargaining representative. *Gene's Bus Co*., 357 NLRB No. 85, slip op. 5 (2011). And, as the Supreme Court has stated, a union's status as exclusive bargaining representative exacts a "negative duty" to "treat with no other." *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 684 (1944). In *El Paso Electric Co.*, 355 NLRB No. 95, slip op. 2 (2010), the Board, citing relevant authorities, restated the established criteria for finding that an employer has engaged in unlawful direct dealing. Those criteria are as follows:

(1) that the [employer] was communicating with union-represented employees;

(2) the discussion was for the purpose of establishing or changing wages, hours and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union.

Under Section 8(d), it is also clear that, once an agreement is struck, an employer may not change terms and conditions of employment that are governed by a collective bargaining agreement during the term of that agreement, absent the consent of the union representing the employees. An employer who does so violates Section 8(a)(5) and (1) of the Act. See *C&S Industries, Inc.*, 158 NLRB 454, 456-459 (1966); and *Mead Corp*., 318 NLRB 201, 202 (1995). In such cases, the gravamen of the violation is contract modification. Thus, the General Counsel must show that there is a contract provision that the employer has modified. An employer's defense is either that the union has consented to the change or that its view of the contract had a "sound arguable basis," demonstrating that there was in fact no unlawful modification of the contract. *Bath Iron Works Corp.*, 345 NLRB 499, 501-502 (2005), affirmed, sub nom., *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). See also *San Juan Bautista Medical Center*, 356 NLRB No. 102, slip op. 3 (2011); and *American Electric Power*, 362 NLRB No. 92 (2015).

In interpreting collective bargaining agreements in connection with unfair labor practice determinations, the actual intent of the parties is given controlling weight. To determine the parties' intent, the Board looks first to the language of the contract, then to relevant extrinsic evidence, such as past practice or bargaining history. *Mining Specialists*, 314 NLRB 268, 268-269 (1994). Moreover "when evaluating whether a contract provision privileges one party to act unilaterally and without the other party's consent," the Board "adheres to a strict standard." *Chemical Solvents, Inc.,* 362 NLRB No. 164, slip op. at 6 (2015).

Respondent Has Violated the Act

Applying the above principles to the facts in this case, I find that Respondent unilaterally, and without the Union's consent, modified the existing bargaining agreement by rescinding the right of employees to use company vehicles to transport themselves to and from their homes and job sites, by requiring employees to give permission for Respondent to access their driving records, and by imposing on employees a disciplinary point system that impacted their ability to drive company vehicles and their job tenure. I also find that the Respondent engaged in unlawful direct dealing with employees thus bypassing the Union, by soliciting authorizations from employees for it to secure their driving records from the Department of Motor Vehicles and by requiring them to submit those records to Respondent, without giving the Union prior notice and opportunity to bargain on those matters. Respondent's conduct in these respects violated Section 8(a)(5) and (1) of the Act.

Respondent's new Fleet Vehicle Policy that was implemented mid-contract and without the consent of the Union clearly modified the existing collective bargaining agreement. First of all, it negated the explicit provision in Article 35 of the existing

contract permitting employees to use company vehicles to transport themselves from their jobsites to their homes and back again. Instead, the new policy lists uses of company vehicles that do not include the contractual right of employees to transport themselves to and from their homes and jobsites.[2]

In addition, the Fleet Vehicle Policy sets forth new rules governing use of company vehicles, including a new and elaborate point system by which Respondent may evaluate employee driving records resulting in penalties that include loss of driving privileges, discipline and termination. Nothing in Article 35 that governs use of company vehicles contains such a disciplinary point system and penalties or gives Respondent the unilateral right to impose such a system with penalties. Nor does Article 35 say anything about the provision in the new policy that permits Respondent to obtain employee authorization to secure driving records in order to monitor and enforce the new disciplinary point system. In these respects, Respondent's new policy also modifies the existing contract and its regulation of use of company vehicles. Indeed, in its answer to this complaint, Respondent admitted that its Fleet Vehicle Policy "includes aspects that are not, and have never been part of the parties' collective bargaining agreement and/or their bargaining history." G.C. Exh. 1(i). Thus, implementation of the new Fleet Vehicle Policy was an unlawful contract modification under Section 8(d) of the Act and an unfair labor practice under Section 8(a)(5) and (1) of the Act.

Respondent's attempt to defend its modification of the existing contract is without merit. It has not shown that it had a "sound arguable basis" in the bargaining agreement for implementing the new Fleet Vehicle Policy. In its initial communications with the Union on this issue, Respondent in effect conceded that it had no contractual basis for implementing the new policy without the Union's approval. It repeatedly asked the Union to bargain over the matter. It was only after the Union refused to consent to any changes in the existing agreement or to reopen bargaining in the middle of the contract that Respondent attempted to rely on contract language to justify the changes. Respondent first took the position that nothing in Article 35 covered the new policy, which was not accurate because, as discussed above, the new policy clearly negated the provision in Article 35 that permitted employees to use company vehicles to transport themselves between their homes and jobsites; and it also added an elaborate point system governing discipline that was not present in Article 35. Later, Respondent took the position that the management rights clause of the contract (Article 2) permitted it to implement the new Fleet Vehicle Policy, because it had the right, under that clause, to "adopt the necessary rules and measures to manage its work force."

Neither of the Respondent's arguments mentioned above amounts to a "sound arguable basis" in the contract itself to justify the modifications it made by implementing the new Fleet Vehicle Policy. Article 35 does not permit Respondent to take away the right of employees to use company vehicles to transport themselves to and from their

[2] Respondent's contention (Br. 27-28) that it has "never limited the bargaining unit use of the company vehicle for the specific circumstances described (sic) CBA" misses the mark. The new Fleet Vehicle Policy by its terms does not permit that contract right and thus employees run the risk of disciplinary action for using their company vehicles in accordance with the existing contract.

homes and jobsites or to impose a disciplinary point system regulating the use of company vehicles. Mere silence in Article 35 does not justify the significant changes implemented by Respondent or provide a "sound arguable basis" for such changes.

Nor does Article 2, the management rights clause, provide such a basis for the changes. Contrary to Respondent's contention (Br. 9-11), Article 2 does not amount to a clear and unmistakable waiver by the Union to object to contract modifications of the sort implemented here. Respondent is correct in its assertion that general language in a management rights clause is insufficient to create a clear and unmistakable waiver, but it is incorrect in asserting that the clause in this case is specific enough. See *Rangaire Co.*, 309 NLRB 1043, 1052 (1992). Nothing in Article 2 refers to Article 35 or the use of company vehicles. Although Article 2 gives Respondent "the exclusive right to supervise, administrate and direct its maintenance and service business operations," that general language is itself limited by the phrase stating, "unless previously negotiated limitations in the agreement are established." Article 35 governing the use of company vehicles is such a negotiated limitation. Moreover, the broad zipper clause in Article 38 of the collective bargaining agreement makes it clear that not only Articles 35 and 2, but also the remainder of the collective bargaining agreement constitute all the issues negotiated by the parties and no changes or additions may be made to anything in the agreement without the consent of the other party. Article 38 thus unambiguously precludes the changes without the Union's consent. See *Mead Corp*., cited above, 318 NLRB at 202-203.[3]

The above makes clear that the four corners of the bargaining agreement offers no sound basis for Respondent's implementation of the new Fleet Vehicle Policy. Nor does reference to bargaining history or past practice offer such support. Respondent does not rely on bargaining history, about which the stipulated record is silent. But, in an apparent attempt to show that past practice supports its position, Respondent peppers its brief with references (see, for example, Br. 11, 25-28) to the employee manual and its language that the manual is to be applied "concurrently" with the existing bargaining agreement. Any reading of the manual, however, is limited by the terms of the bargaining agreement. Nothing in that agreement mentions the employee manual. And since nothing in the bargaining agreement gives Respondent the green light to unilaterally apply the manual to unit employees, the bargaining agreement takes precedence over the manual. Indeed, the parties stipulated that the reference to the manual being applied "concurrently" with the bargaining agreement was meant to restrict its application only to areas that are "not inconsistent with the terms and provisions of the collective bargaining agreement." Stipulation no. 5. Respondent implicitly recognized this restriction when, according to the stipulation (no. 7), its officials

[3] Respondent's contends (Br. 11) that the management rights clause and Article 20, the clause regarding termination and discipline, show that the Union "waived its right to bargain "over the amendments to the Employee Manual and the provisions included in the Fleet Vehicle Policy." But neither of those provisions mentions the employee manual or Article 35, which governs the regulation of employee use of company vehicles. And since there is no other reference to the employee manual in the bargaining agreement, the zipper clause language in Article 38 effectively trumps Respondent's position. Thus, that portion of the Board's decision in *Provena St. Joseph Hospital Center*, 350 NLRB 808, 815 (2007), relied on by Respondent, is clearly distinguishable from this case.

modified the Fleet Vehicle Policy originally forwarded to them by its parent to "temper it" to the collective bargaining agreement. This view is confirmed by the broad contractual zipper clause in Article 38, which states that everything that could have been bargained was reflected in the contract and bans Respondent from making changes without the consent of the Union. Finally, it does not appear that the manual was ever used as a basis for disciplining employees for improperly driving company vehicles. The stipulation of the parties refers to only two instances of discipline of employees for that purpose prior to implementation of the new Fleet Vehicle Policy. Both referenced Article 35 of the agreement, thus indicating that discipline for improper driving was predicated on Article 35 and not on the employee manual. See no. 32 of the stipulation and Jt. Exh. 28.

Accordingly, I find that, by implementing its new Fleet Vehicle Policy without the Union's consent, Respondent modified the existing bargaining agreement in violation of Section 8(a)(5) and (1), as well as 8(d), of the Act This violation includes the application of the Fleet Vehicle Policy to discipline employee Pedro Sanchez. It is settled law that if unlawfully imposed rules or policies are a factor in an employee's discipline, that discipline violates Section 8(a)(5) and (1). See *Great Western Produce*, 299 NLRB 1004, 1005 (1990).[4]

In addition, Respondent's implementation of the provision in the new policy permitting it to obtain authorizations or otherwise to secure employee driving records amounted to direct dealing with employees over terms and conditions of employment—a violation of Section 8(a)(5) and (1) of the Act, that is related to, but separate and apart from, modification of the contract. The Fleet Vehicle Policy states that all employees "must give permission to the company to access initial and periodic reports from the Department of Motor Vehicles" under penalty of losing their driving authorization and possible disciplinary action. (Joint Exh. 17(b), p. 8, section H.). It was stipulated that Respondent sought and obtained such authorizations from employees without first notifying the Union and giving it an opportunity to bargain over the matter. It was also stipulated that, in the February 2015 training sessions, without having notified the Union or given it an opportunity to be present, Respondent told employees the new policy required employees to provide a copy of their driving records in order to determine whether disciplinary action should be taken. It is also clear that such direct dealing was for the purpose of changing existing terms and conditions of employment since such authorizations and submissions were not previously required. Nor was the Union consulted so the direct dealing naturally undercut the Union's role as exclusive bargaining representative. Thus, under the criteria set forth in the *El Paso Electric* case, cited above, Respondent's direct dealing clearly violated Section 8(a)(5) and (1) of the Act.

[4] In view of my finding on contract modification issue, I do not reach the General Counsel's alternative contention (Br. 25-27) that the new policy was implemented as a fait accompli. Nor do I reach the Respondent's defense to that contention (Br. 16-22)—that it gave the Union sufficient notice and opportunity to bargain.

Respondent defends its acknowledged direct dealing by asserting (Br. 28-32) that (1) it had always had the authority to review employee driving records under its employee manual, which, in its view, amounted to an existing term and condition of employment; and (2) the direct dealing allegation is time-barred under Section 10(b) of the Act. Those defenses are without merit. Respondent's first point misses the gravamen of the violation, which is soliciting and obtaining employee authorizations and thereafter confirming this requirement in the training sessions for the new Fleet Vehicle Policy. If, as Respondent suggests, it already had the right to obtain employee driving records, why did it seek employee authorizations? Obviously there was a reason and that reason was based on the implementation of the new Fleet Vehicle Policy, which required access to the driving records. That policy was thus not only a contract modification, but also a new and changed condition of employment. Moreover, Respondent's position is based on an erroneous reading of its employee manual that, as shown above, must be read as being consistent with and not contradicting the existing bargaining agreement. Nothing in the collective bargaining agreement gave the Respondent the right to solicit and obtain employee authorizations to secure their driving records. The zipper clause in Article 38 confirms that view.

Nor is the direct dealing allegation barred by Section 10(b) of the Act. Respondent asserts that, as early as the 2012 employee manual, employees knew that they had to authorize Respondent to obtain their driving records. As indicated above, however, the employee manual may not be inconsistent with the collective bargaining agreement; and Respondent's effort to utilize employee driving records was a crucial part of the new Fleet Vehicle Policy. As also indicated above, the gravamen of the direct dealing violation here is soliciting and obtaining employee authorizations and confirming during the training sessions that the authorizations were required under the new Fleet Vehicle Policy—not whatever theoretical right Respondent had to seek and obtain authorizations under the employee manual. Most of those authorizations were obtained within 6 months of the filing of the original charge on January 15, 2015; others and all of the training sessions, pursuant to the new Fleet Vehicle Policy, were dated before the amended charges filed on March 4 and May 1, 2015. See G.C. Exh. 1(a), (c) and (e).[5]

Finally, contrary to Respondent's contention (Br. 33), this case is not well suited to resolution by arbitration under the standards set forth in applicable Board law. See generally *San Juan Bautista Medical Center*, cited above, 356 NLRB No. 102, at slip op. 2. First of all, the new Fleet Vehicle Policy specifically contradicts the contractual right of employees to use company vehicles to transport themselves between their homes and their jobsites. On that point, there is no contract language to interpret. Nor does anything else in the contract, including the management rights clause, justify modification of Article 35 on the use of company vehicles to create a new disciplinary point system for employees driving company vehicles. Any doubt on this score is eliminated by reference to the broad zipper clause in Article 38. Thus, the matter here is less about contract interpretation than about the significant alteration of the contract and

[5] In reading Joint Exh. 25, I found that only 3 of the authorizations were dated outside the Section 10(b) period.

the affront to the Union's right under Section 8(d) to consent to mid-contract modifications. In any event, even if the contract modification issue were viewed as deferrable, the direct dealing issue, which is clearly statutorily based, is not. And it is well settled that the Board will not defer a case if one issue is deferrable and another, with which it is intertwined, is not. In those circumstances, the Board does not favor "piece-meal deferral of complaint allegations." *Gene's Bus Co.*, cited above, 357 NLRB No. 85 at slip op. 6-7.

Conclusions of Law

1. By dealing directly with employees in soliciting their authorizations to secure driving records from the Department of Motor Vehicles and soliciting them to submit copies to Respondent, without giving the Union that had the exclusive right to represent those employees notice and opportunity to bargain over the matter, Respondent bypassed the Union and violated Section 8(a)(5) and (1) of the Act.
2. By unilaterally, and without the Union's consent, implementing its new Fleet Vehicle Policy, thus modifying the existing collective bargaining agreement insofar as it rescinded the right of employees to transport themselves to and from their homes and jobsites, required employees to grant Respondent permission to access their driving records, and imposed on employees a new disciplinary point system that impacted their ability to drive company vehicles and their job tenure, Respondent violated Section 8(a)(5) and (1) of the Act.
3. By applying its unlawfully implemented Fleet Vehicle Policy to discipline employee Pedro Sanchez, Respondent violated Section 8(a)(5) and (1) of the Act.

Remedy

Having found that Respondent committed unfair labor practices within the meaning of the Act, I shall order it to cease and desist from such conduct and take certain affirmative action designed to effectuate the purposes of the Act. More specifically, Respondent will be ordered to rescind its new Fleet Vehicle Policy, which was unlawfully implemented without the Union's consent, and also the authorizations by employees for Respondent to obtain their driving records, which were secured without notification to or bargaining with the Union. Since its violations included applying the unlawfully imposed Fleet Vehicle Policy to employee Pedro Sanchez, Respondent will also be ordered to rescind its discipline of him under that Policy.[6]

[6] Because the stipulated facts show that the only discipline under the new Fleet Vehicle Policy was that involving employee Sanchez and because that discipline did not involve a loss of wages, there is no need for a back pay remedy in this case.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended[7]

ORDER

The Respondent, Trane Puerto Rico, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Congreso de Uniones Industriales de Puerto Rico (the Union) in the following appropriate unit:

> All service and maintenance employees employed by Respondent at its San Juan, Puerto Rico facility, excluding all office and clerical employees, professional personnel, senior service technicians, guards and supervisors as defined in the Act.

(b) Unilaterally, and without the Union's consent, changing the terms and conditions of the existing collective bargaining agreement between it and the Union.

(c) Unilaterally changing the terms and conditions of employees without first notifying the Union and giving it the opportunity to bargain about such changes.

(d) Dealing directly with unit employees over their wages, hours, terms and conditions of employment.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union as the exclusive bargaining representative of employees in the above-described unit.

(b) Rescind any and all authorizations by employees that were secured directly from employees without first notifying their bargaining representative and giving it the opportunity to bargain about such authorizations, and, on request, bargain with the Union about such authorizations.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

(c) Rescind, in its entirety, the unilaterally imposed new Fleet Vehicle Policy and any discipline or other adverse sanctions issued to employees, including Pedro Sanchez, because of the imposition of that policy.

(d) Within 14 days after service by the Region, post at its San Juan, Puerto Rico facility, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 15, 2015.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 15, 2015

Robert A. Giannasi
Administrative Law Judge

[8] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

> Form, join, or assist a union
> Choose representatives to bargain with us on your behalf
> Act together with other employees for your benefit and protection
> Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with Congreso de Uniones Industriales de Puerto Rico (the Union) in the following appropriate unit:

> All service and maintenance employees employed by Respondent at its San Juan, Puerto Rico facility, excluding all office and clerical employees, professional personnel, senior service technicians, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally, and without the Union's consent, change the terms and conditions of the existing collective bargaining agreement between us and the Union.

WE WILL NOT unilaterally change the terms and conditions of employees without first notifying the Union and giving it the opportunity to bargain about such changes.

WE WILL NOT deal directly with unit employees over their wages, hours, terms and conditions of employment.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL bargain collectively and in good faith with the Union as the exclusive bargaining representative of employees in the above-described unit.

WE WILL rescind any and all authorizations by employees that were secured directly from employees without first notifying their bargaining representative and giving it the opportunity to bargain about such authorizations, and, on request, bargain with the Union about such authorizations.

WE WILL rescind, in its entirety, the unilaterally imposed new Fleet Vehicle Policy and any discipline or other adverse sanctions imposed upon employees, including Pedro Sanchez, because of the imposition of that policy.

TRANE PUERTO RICO, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

South Trust Plaza, 201 East Kennedy Boulevard, Ste 530, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-144599 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTIE OF COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5353